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The Effect in National Legal Systems of the Prohibition of Discrimination on Grounds of Age as a General Principle of Community Law

Case C-144/04, *Werner Mangold v. Rüdiger Helm* [2005]
ECR I-9981

By Prof. Jan H. Jans*

1. Introduction

Discrimination in European law is a ‘hot issue’. The judgment of the Court of Justice in the *Mangold* case has already led to comments from a number of writers.¹ In one of the Netherlands’ quality newspapers, the journalist, Frank Kuitenbrouwer, for instance, accused the Court of Justice of a lack of modesty and of impermissible judicial activism.² In addition, in an editorial comment in the *Common Market Law Review*, the Court of Justice was accused of having interpreted the EC Treaty *contra legem*, and it was stated that all coherence regarding one of the central doctrines of European law – the principle of direct effect – has been lost.³

In *Mangold*, the Court found that Community law, in particular Article 6(1) of Directive 2000/78, precludes national legislation from permitting the unrestricted conclusion of fixed-term contracts of employment for workers aged 52 or older, and that it is for the national courts to ensure the full implementation of the general principle of non-discrimination on grounds of age by refraining from applying any incompatible provision of national legislation, even if the implementation period for the Directive has not yet elapsed. The importance of this decision, however, goes far beyond the scope of the law of employment contracts. More generally, the possibility of invoking general principles of Community law in contractual relationships is at issue.

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1. Case C-144/04 *Mangold* [2005] ECR I-9981.

2. F. Kuitenbrouwer, *Onbescheiden rechters*, NRC Handelsblad, 7 February 2006.

3. CML Rev. 2006, p. 1–8.

What is going on here? Is it really true that the Court of Justice has lost its bearings as a result of the law of employment contracts? This is reason enough to take a closer look at the issue of the effect of the EC prohibition on age discrimination in the national legal system.

2. The Principle of Non-discrimination on Grounds of Age in the EC Treaty and in Directive 2000/78

The principle of non-discrimination on grounds of age appears in written European law in a number of places. The basic provision is Article 13(1) of the EC Treaty, as included by the Treaty of Amsterdam, which provides:

‘Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.’⁴

The exact wording of this provision was carefully chosen. The authors of the provision wanted to express the fact that the grounds of discrimination mentioned will only have effect in European and national law as a result of further legislative acts.⁵ It does not contain an explicit prohibition – which reveals a stark contrast with, *inter alia*, the prohibition of discrimination on the grounds of nationality in Article 12 EC.⁶ In other words, Article 13 does not contain a directly effective prohibition; it merely creates a competence for the European legislator to take the measures needed to combat these types of discrimination.

In order to comply with the task set out in the Treaty, the Council, *inter alia*, has adopted Directive 2000/78 establishing a general framework for equal

4. Emphasis added.

5. Cf. the *Grant* case, Case C-249/96, [1998] ECR I-621, a case from before the entry into force of the Treaty of Amsterdam, where the Court concluded that EC law does not contain a prohibition of discrimination on grounds of sexual orientation. Yet it added: ‘It should be observed, however, that the Treaty of Amsterdam [...] provides for the insertion in the EC Treaty of an Article 6a which, once the Treaty of Amsterdam has entered into force, will allow the Council under certain conditions [...] to take appropriate action to eliminate various forms of discrimination, including discrimination based on sexual orientation.’

6. Art. 12(1) EC: ‘Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.’

treatment in employment and occupation.⁷ Article 1 of this Directive provides that its purpose is ‘to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.’ It appears from Article 2(2) of the Directive that ‘direct discrimination’ occurs ‘where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1’. Notwithstanding Article 2(2), Article 6(1) of the Directive states that Member States may provide that differences of treatment on grounds of age shall not constitute discrimination if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate policy aims relating to employment policy, labour market and vocational training, and if the means of achieving that aim are appropriate and necessary. Under Article 16, the Member States shall take the measures necessary to ensure that all legislative and administrative provisions which are in conflict with the principle of equal treatment are removed. This is the legal framework within which the *Mangold* case arose.

3. The Mangold Case

On 26 June 2003, Mr Mangold, then 56 years old, concluded an employment contract with Mr Helm, a practising lawyer. This contract took effect on 1 July 2003 and lasted until 28 February 2004. The length of the agreement was based on para. 14(3), fourth sentence in conjunction with para. 14(3), first sentence of the *Gesetz über Teilzeitarbeit und befristete Arbeitsverträge und zur Änderung und Aufhebung arbeitsrechtlicher Bestimmungen* (TzBfG). In short, the German law comes down to the following: in order for a *fixed-term* employment contract to be concluded, an objective reason is necessary, unless it concerns a worker who at the moment of concluding the employment contract has reached the age of 58 years or older. In 2002, this age was reduced temporarily, until the end of 2006, from 58 to 52.

In proceedings against Helm before the *Arbeitsgericht München*, Mangold claimed that the German law was in conflict with European law, especially with clauses 2, 5 and 8 of the framework agreement on fixed-term employment contracts, which was concluded on 18 March 1999, and in application of which

7. Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ 2000 L 303/16. Based on this provision, besides Directive 2000/78, another Directive has also been adopted: Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ 2000 L 180/22–26.

Directive 1999/70/EC⁸ and Article 6 of Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation were adopted.

The *Arbeitsgericht München* also doubted the compatibility of the German law with Community law. That court was of the opinion that there was an infringement of Article 6 of Directive 2000/78, since the reduction from 58 to 52, introduced in 2002, of the age at which fixed-term employment contracts may be concluded without objective reasons does not guarantee the protection of the elderly on the employment market.

According to its Article 18(1), this Directive should have been transposed into national law by 2 December 2003. However, pursuant to the second para. of Article 18, Member States could request the Commission for an additional period of three years to implement the Directive. Since Germany had requested (and been granted) this additional period, the end of the period for Germany to implement the Directive is 2 December 2006.

As regards the question of whether the German law was compatible with the Directive, the Court of Justice held first that, according to Article 1 of Directive 2000/78, the purpose of the Directive is to establish a general framework combating discrimination on one of the grounds mentioned in this Article, including age, as regards employment and occupation. The Court stated that, by offering employers the possibility to conclude fixed-term employment contracts with workers aged 52 and over, without limitation, the German law created unequal treatment directly based on age. However, this difference in treatment in principle can be justified, on the basis of Article 6(1) of the Directive, since this law has as its objective the promotion of integration into the workforce of unemployed older workers: 'The legitimacy of such a public-interest objective cannot reasonably be thrown in doubt, as indeed the Commission itself has admitted' (para. 60). Such legislation must, however, according to Article 6(1), be 'objective and reasonable', whereby the Court stated that Member States must 'unarguably enjoy broad discretion in their choice of the measures capable of attaining their objectives in the field of social and employment policy' in this context. However, this review of the principle of proportionality turned out negatively for the German legislator. According to the ECJ, the application of the German legislation would lead to a situation in which all workers who have reached the age of 52, without distinction, whether or not they were unemployed before the contract was concluded and whatever the duration of any period of unemployment, may lawfully, until the age at which they may claim their entitlement to a retirement pension, be offered fixed-term contracts of employment which may be renewed an indefinite

8. Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, OJ 1999 L 175/43.

number of times. This significant body of workers, determined solely on the basis of age, is thus in danger, during a substantial part of its members' working life, of being excluded from the benefit of stable employment which, however, as the Framework Agreement makes clear, constitutes a major element in the protection of workers, the ECJ followed. The ECJ considered this to go beyond what is appropriate and necessary, as such legislation takes the age of the worker concerned as the *only* criterion for the application of a fixed-term contract of employment.

So far, nothing peculiar has arisen. The Court of Justice interpreted a provision of a directive and considered the German law to be in conflict with this provision; no more and no less. It does not seem to me that this concerns an improper form of judicial activism: the Court recognized the promotion of the integration of older workers into the workforce as a legitimate ground to justify the unequal treatment, and it also recognized that in their choice of measures necessary in attaining this, the Member States enjoy 'a broad discretion'. The principle of proportionality is in this case the only thing that puts a spanner in the works for the German legislator. It was because of this principle that the German law was considered to be in conflict with the Directive.

The problem Mangold faced, however, was that for Germany the period for implementation of the Directive did not end until 2 December 2006. Add to that the fact that, according to constant case law, directives do not have horizontal effect,⁹ and at first glance, it would appear clear that Mangold would have little chance of succeeding in his action against his employer Helm, even though the German legislation was in conflict with the Directive. The Court of Justice, however, held a different opinion and had essentially two arguments for this.

First, the Court pointed to the so-called *Inter-Environnement* doctrine.¹⁰ Based on that case law, Member States must, during the period for implementation of a directive, '*refrain from taking any measures liable seriously to compromise the result prescribed*'. The essential argument of the Court lies however in paras 74–77 of the judgment. The ECJ noted that Directive 2000/78 does not itself lay down the principle of equal treatment in the field of employment and occupation. Indeed, in accordance with Article 1 thereof, the sole purpose of the directive is 'to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation', the source of the actual principle underlying the prohibition of those forms of discrimination being found, as is clear from the third and fourth recitals in the preamble to the directive, in various international instruments and in the

9. Case C-91/92 *Faccini Dori* [1994] ECR I-3325.

10. Case C-129/96 *Inter-Environnement* [1997] ECR I-7411. I will not discuss further this argument here.

constitutional traditions common to the Member States. Therefore, the Court concluded that ‘the principle of non-discrimination on grounds of age must thus be regarded as a general principle of Community law.’ Consequently, once again in the words of the ECJ, ‘observance of the general principle of equal treatment, in particular in respect of age, cannot as such be conditional upon the expiry of the period allowed the Member States for the transposition of a directive intended to lay down a general framework for combating discrimination on the grounds of age, in particular so far as the organization of appropriate legal remedies, the burden of proof, protection against victimization, social dialogue, affirmative action and other specific measures to implement such a directive are concerned.’ In those circumstances, it is the responsibility of the national court, hearing a dispute involving the principle of non-discrimination in respect of age, to provide, in a case within its jurisdiction, the legal protection which individuals derive from the rules of Community law and to ensure that those rules are fully effective, setting aside any provision of national law which may conflict with that law.

In sum, the principle of non-discrimination on grounds of age must be considered as ‘a general principle of Community law’; national legislation which is in conflict with that principle must be set aside by the national court (apparently also in civil relations). These considerations in particular led to the indignant reaction of Kuitenbrouwer and the editors of the *Common Market Law Review*. Thus, it is high time to consider their arguments.

4. General Principles of Law and their Position in the Hierarchy of Norms

Kuitenbrouwer writes the following about *Mangold*:

‘The most recent example is the *Mangold* case. This case is about an older worker who complained that the German law on fixed-term employment contracts contains prohibited discrimination. Here too a European directive was involved. The German law was in conflict with it. The period for implementation (transposition into national legislation) had however not elapsed. In fact, Germany had insisted on an additional period of time, since a number of adjustments to its legislation seemed necessary. The Court did not take this additional period into account and declared the German law nevertheless to be in conflict with EU law. Not on the grounds of the Directive, but based on non-discrimination as a general principle of law of the EU. Why, in that case, is a specific directive necessary?’¹¹

11. Unofficial translation.

This seems convincing, but it is not. The case at hand is a simple example of hierarchy of norms. If indeed something like a general principle of Community law prohibiting discrimination on grounds of age exists, this has a higher order in the legal hierarchy of sources of Community law than the Directive. General principles of Community law have (at least) the status of primary law, while a 'simple' directive merely has the status of secondary law. Thus, a written prohibition of discrimination may 'merely' be regarded as 'a specific enunciation of a general principle of equality which is one of the fundamental principles of Community law. This principle requires that similar situation shall not be treated differently unless differentiation is objectively justified.'¹² In other words, the European legislator (source of Directive 2000/78) is bound in its legislative task by the boundaries set by 'higher' law. Or, in yet other words, the effect of the prohibition of discrimination on grounds of age cannot be rendered inapplicable by the European legislator. That is essentially what the Court of Justice has stated.

Years ago, the Court answered Kuitenbrouwer's question as to why a specific directive is necessary, although in a different context, in the *Defrenne II* case.¹³ That case concerned the possible direct effect of what is now Article 141 EC.¹⁴ In that case, the Court made a distinction between 'direct and overt' discrimination on the one hand, and 'indirect and disguised' discrimination on the other. Direct discrimination was described as discrimination, which can be identified with the aid of the criteria 'equal pay' and 'equal work' without the need for further precision in Community or national law. These types of discrimination fall under the direct effect of the prohibition of Article 141(1) EC. Indirect discrimination, on the other hand, cannot be challenged with the aid of Article 141 EC, since these can only be determined with the aid of more precise legislation. In other words, the equal pay rule contains a hard, legally perfect core, which can be applied as such by a court, without the necessity of further elaboration in directives aiming at further implementation and facilitation of that rule.

This obviously does not imply that directives are totally superfluous; they are necessary in order to eliminate precisely those discriminations, which do not fall under the hard and legally perfect core of Article 141 EC.¹⁵ The extensive

12. Cf. Joined Cases 117/76 and 16/77 *Ruckdeschel* and Joined Cases 124/76 and 20/77 *Moulin de Pont-a-Mousson* [1977] ECR 1753 and 1795.

13. Case 43/75 *Defrenne II* [1976] ECR 455. It is remarkable that the Court did not refer to *Defrenne II* at all in *Mangold*, but it did refer to its judgments in *Caballero*, *Simmmenthal* and *Solred*. These judgments did not concern horizontal, but vertical relationships.

14. The text of which reads: 'Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.'

15. See also Case 2/74 *Reyners* [1974] ECR 631, where the Court, in the context of the right of establishment, stated that after the transitional period, directives intended to guarantee the principle of equal treatment have become superfluous, because the equal treatment rule itself has acquired

equal treatment directives illustrate this point of view. Surely, Kuitenbrouwer would not want to claim that the European legislator could limit the effect in time of the principle of equal pay, insofar as this falls within the directly effective core of Article 141 EC?

In this context, it is also interesting to note the view of the current Dutch judge in the Court of Justice, Timmermans, in his contribution on Article 13 EC in one of the leading Dutch textbooks on European law, *Kapteyn-VerLoren van Themaat*.¹⁶ After pointing out, in accordance with the prevailing theories, that Article 13 EC does not have direct effect and merely provides a legal basis, he stated that this cannot lead to the conclusion that discrimination coming under Article 13 EC is permitted as long as the Council has not taken any legislative measures on the basis of that provision. 'Manifest instances of discrimination' according to Timmermans will, as a rule, be susceptible to condemnation as being in conflict with the general principle of equal treatment! Senden, in her inaugural lecture, argued against this, that it is evident from Article 13 EC that Member States did not want to enshrine a general principle of discrimination on grounds of age.¹⁷ That may be so, but – in my reading of Timmermans – neither can it be assumed that the drafters of the Treaty intended Article 13 EC to limit and/or reverse the effect of the existing general principle of equal treatment. In other words, admittedly, Article 13 EC does not create *new* directly effective obligations for the Member States; but neither does it diminish the *existing* general principle of equal treatment.

Thus, what the Court did in *Mangold* in fact is not that special, at least if we accept that something like a general principle of Community law prohibiting discrimination on grounds of age exists, and that such a prohibition may be relied upon before the national court.

5. The Prohibition of Horizontal Direct Effect of EC Directives

The objections of the editors of the *CML Rev.* are of a different kind, and mainly concern the horizontal (or third party) effect of directives which this judgment, in their view, has created. After all, this judgment seems to make it possible to rely successfully on the prohibition of age discrimination in the

direct effect. The Court continued to state that: 'these Directives have however not lost all interest since they preserve an important scope in the field of measures intended to *make easier* the effective exercise of the right of freedom of establishment.' (para. 31; emphasis added).

16. Kapteyn-VerLoren van Themaat, *Het recht van de Europese Unie en van de Europese Gemeenschappen*, Deventer 2003 (6th edition), p. 137.

17. L.A.J. Senden, *Over idealen en ideale rechtsvorming in de Europese Unie*, inaugural lecture, University of Tilburg, 10 March 2006. The text is available on the website at: <http://www.uvt.nl/webwijz/show.html?anr=687502>

private legal relationship between employee (Mangold) and employer (Helm). They objected that this decision has knocked the bottom out of the prohibition of horizontal effect of EC directives. Again, my question is whether the judgment is really as shocking as they would have us believe?

First of all, it should be pointed out that various types of horizontal effect of directives exist. In our discussion, the following two types are of particular importance. The first type exists where an individual wishes to rely on a directive as a *direct* basis for his legal claims against other individuals.¹⁸

The second type is what I would like to call the *CIA Security*-type. In a relationship based on private law, one of the parties claims the inapplicability of public law rules that govern the legal relationship between the private parties, because they breach Community law. The Court recognized in the *CIA Security* case¹⁹ (and confirmed in *Unilever Italia*²⁰), that in such cases the direct effect of Community law can be relied on, even in a horizontal relationship. In practice, this means that even in private legal relationships, rules of public law should not be applied when they are incompatible with a directive. No civil law claims then can be based on these national rules.

It follows from the paras of the *Mangold* case cited above, that it is in essence a *CIA-Security*-like situation. The private law relationship Mangold/Helm is, to a large extent, governed by German public law rules. The German legislation in principle prohibits fixed term contracts, but the law of 2002 violates the prohibition of age discrimination, by lowering the age limit above which this prohibition does not apply to 52. By considering the law of 2002 to be in violation of the prohibition of age discrimination, in fact the general rule of the German legislation that fixed term contracts are not allowed is reinstated in the relationship Mangold/Helm.

The reason why the Court did not apply the *CIA Security* and *Unilever Italia* case law in *Mangold* has to do with the fact that the Court, it seems, further limited this possibility of *invocabilité d'exclusion* in *Pfeiffer*.²¹

The *Pfeiffer* case concerned an employment dispute between a number of ambulance emergency workers and the German Red Cross, about the German legislation providing for a weekly working time of more than 48 hours and Article 6(2) of Directive 93/104 concerning certain aspects of the organization of working time.²² According to the Court, the directive provision must be interpreted as precluding legislation in a Member State

18. This concerns 'Faccini Dori-like' situations: Ms. Dori who relied against the seller on the right laid down in a directive to request rescission of the contract of sale.

19. Case C-194/94 *CIA Security* [1996] ECR I-2201.

20. Case C-443/98 *Unilever Italia* [2000] ECR I-7535.

21. Joined cases C-397/01 to C-403/01 *Pfeiffer* [2004] ECR I-8835. See also the annotation by S. Prechal in SEW 2005/2, p. 95–99 and CML Rev. 2005, p. 1445–1463.

22. OJ 1993 L 307/18.

the effect of which, as regards periods of duty time (*Arbeitsbereitschaft*) completed by emergency workers in the framework of the emergency medical service of a body such as the Deutsches Rotes Kreuz, is to permit, including by means of a collective agreement or works agreement based on such an agreement, the 48-hour maximum period of weekly working time laid down by that provision to be exceeded. This provision furthermore has direct effect. However, the Court stated that ‘even a clear, precise and unconditional provision of a directive seeking to confer rights or impose obligations on individuals cannot of itself apply in proceedings exclusively between private parties.’²³

Thus, the *CIA Security* type of horizontal effect only seems to be available when relying on directives that do *not* intend to grant rights to private individuals, as was the case in *CIA Security* and *Unilever Italia*. And since Directive 2000/78 is unquestionably a directive that intends to grant rights to private individuals, *Pfeiffer* would mean that the German legislation that was at issue in *Mangold* could not be undermined by reference to the Directive, at least not in the private law relationship between Mangold and Helm.²⁴

6. Horizontal Effect of General Principles of Law

The issue in *Mangold*, however, does not involve any type of horizontal effect of directive provisions. Neither does the Court say in *Mangold* that the prohibition of age discrimination, as a general principle of Community law, has ‘real’ horizontal effect.²⁵ It merely says that this general principle of Community law can be relied on before a national court in order to challenge the validity of national legislation that conflicts with this norm.²⁶ *Mangold* is thus ‘only’ about *invocabilité d’exclusion*, as described above. Moreover, even if the Court had accepted ‘real’ horizontal effect of the prohibition of age discrimination in *Mangold*, this would still be completely in line with the case law of the Court on the basis of which a limited number of fundamental principles of Community law have not only vertical, but also horizontal effect. The Court decided, for instance, in 1976 in *Defrenne II* that ‘the principle’ of equal pay

23. Joined cases C-397/01 to C-403/01 *Pfeiffer* [2004] ECR I-8835, para. 109.

24. *A fortiori*, and on this issue agreeing with the editorial comment in CML Rev. (see footnote 3), Mangold would also be unable to challenge the validity of the German legislation in his dispute with Helm by relying on the *Inter-Environnement* doctrine (see para. 67 in *Mangold*).

25. In the sense that Helm would have a legal duty, based on this general principle of Community law, not to discriminate against Mangold on grounds of age.

26. That general principles of Community law can bind not only the institutions, but also the Member States is of course nothing new; see for instance joined cases 201 and 202/85 *Klensch* [1986] ECR 1986, 3477.

for men and women is ‘mandatory’, so that ‘the prohibition on discrimination between men and women applies not only to the action of public authorities, but also extends to all agreements which are intended to regulate paid labour collectively, as well as to contracts between individuals’.²⁷ Now, it can of course be objected that the Court could find a basis for this statement in the EC Treaty. But, if we study the relevant Treaty provision carefully, we can see that no ‘prohibition’ is mentioned. The Member States ‘shall ensure’ that ‘the principle of equal pay’ ‘is applied’. That a ‘principle’ can have horizontal direct effect is thus not something that the Court invented in *Mangold*, but can be traced back to case law of thirty years ago.

The well-known *Bosman* case also can be referred to, in which Bosman successfully relied on the rules regarding the free movement of persons in challenging the legitimacy of the UEFA’s transfer rules.²⁸ Or take Angonese, who applied to take part in a competition for a position with a private banking undertaking in Bolzano, in the bilingual part of Italy. He was denied a place in the competition because he was not in possession of a certain certificate showing his bilingualism. Angonese challenged this decision of the bank before the Italian court by relying on the provisions regarding the free movement of workers. He claimed that the certificate of bilingualism required by the bank would conflict with the prohibition of discrimination on grounds of nationality, as laid down in Article 39 EC. Taking into account the fundamental importance of this prohibition, the Court in this case reached the conclusion that it also applies to private individuals.²⁹

In short, there is a steady line of case law stating that certain fundamental principles of European law – equal pay for men and women; prohibition of discrimination on grounds of nationality – can be relied on before the courts not only in the relationship between the individual and the public authorities, but also between private individuals. Accordingly, *Mangold*, in this sense, is not particularly unique.

7. The Prohibition of Age Discrimination as a General Principle of Community Law

Finally we have reached the key question: what, in essence, is the legal basis of this prohibition of age discrimination in the employment relationship between Mangold and Helm? Can the basis perhaps be found in Article 13(1)

27. See, in particular, para. 39.

28. Case C-415/93 *Bosman* [1995] ECR I-4921.

29. Case C-281/98 *Angonese* [2000] ECR I-4139.

EC Treaty? As already mentioned above, Article 13 EC Treaty does not contain a prohibition having direct effect, but only creates the competence for the European legislator to take the measures necessary to combat the types of discrimination mentioned. If the Court had found the legal basis for the prohibition of age discrimination in Article 13 EC, then there indeed would have been sufficient reason to be indignant, and to accuse the Court of *contra legem* interpretation of Article 13 EC.

The Court, however, searched for, and found, the legal basis elsewhere. In para. 74 of the decision, we can read that the origin of this prohibition can be found 'in various international instruments and in the constitutional traditions common to the Member States'. Now, the Court did not invent this itself, or conjure it up out of nowhere,³⁰ but, according to para. 74 in *Mangold*, based itself on the express wording of recitals 1 and 4 of the preamble to Directive 2000/78:

'(1) In accordance with Article 6 of the Treaty on European Union, the European Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to all Member States and it respects fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

[...]

(4) The right of all persons to equality before the law and protection against discrimination constitutes a universal right recognized by the Universal Declaration of Human Rights, the United Nations Convention on the Elimination of All Forms of Discrimination against Women, United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and by the European Convention for the Protection of Human Rights and Fundamental Freedoms, to which all Member States are signatories. Convention No. 111 of the International Labour Organization (ILO) prohibits discrimination in the field of employment and occupation.'

Apparently, the Council is itself of the opinion that such a prohibition exists and that therefore the directive itself does not create the prohibition,³¹

30. Cf. X. Groussot, *Creation, General Principles of Community Law*. Groningen 2006, p. 10. 'Principles don't fall from heaven.' Cf. also Gil Carlos Rodríguez Iglesias, 'Reflections on the General Principles of Community law'. *Cambridge Yearbook of European Legal Studies* 1999, p. 1–16, at p. 15/16. The former president of the Court of Justice believes that judicial interpretation with regard to general principles of Community law is a strictly legal matter and that this process of interpretation should not be regarded as an impermissible form of judicial activism.

31. The directive itself, in its operational provisions, does not contain in so many words a 'prohibition of discrimination.'

but simply facilitates the combating of age discrimination. The Court in fact did no more than follow this view of the Council, mentioned in Article 1 of the Directive, and came to the conclusion that the Directive's *sole* purpose is 'to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment'.

On the other hand, the question can be posed as to whether the Court failed to give the matter sufficient consideration. In fact, international law is not as clear as all that with regard to age discrimination. The international instruments mentioned in the preamble indeed do contain prohibitions of discrimination, but are silent as regards age. Article 26 of the International Covenant on Civil and Political Rights, for instance, does not mention age as a non-discrimination ground. The addition in the final sentence 'or other status', however, indicates that age could also be a ground of non-discrimination under this convention.³² The same can be said about national constitutional law. In many constitutions, discrimination is prohibited, the texts are however silent on 'age' as a prohibited distinguishing criterion. Thus, it is not surprising that the preamble of Directive 2000/78 does not mention the constitutional traditions³³ of the Member States in regard to this issue.

Even if we assume that a general principle of Community law prohibiting age discrimination does exist, and that the core of this general principle has direct effect, even in private legal relationships, it does not immediately become clear that the German legislation in *Mangold* infringed this general principle. In my opinion, the Court should have made clear why the German legislation not only violated Article 6(1) of Directive 2000/78, but also the general legal principle prohibiting age discrimination. After all, these two norms are not identical. Incompatibility with Article 6(1) of Directive 2000/78³⁴ does not necessarily entail a *manifest*³⁵ violation of the general principle of equality. By not doing so, the Court created the impression that – trapped by its own case law on the non-horizontal effect of directives – it wanted to get around this case law.

32. Also cases that have been brought in the Netherlands show that age as a non-discrimination ground comes under this article of the ICCPR; see for instance Central Appeals Tribunal 25 January 2005, LJN: AS4163. See also National ombudsman, 25 July 1997, AB 1997/342 (annotation PJS).

33. As is well known, the 'constitutional traditions' of the Member States are also a source of Community legal principles; see the text of article 6(2) EU Treaty.

34. Or rather: with the principle of proportionality laid down in the Directive!

35. The term is used by Timmermans (see footnote 16).

8. Conclusion

The decision of the Court of Justice in *Mangold* is important from the point of view of direct effect of general principles of law in general³⁶ and the possibility to rely on the prohibition against age discrimination in national law on employment contracts in particular. Much of the criticism given with regard to this judgment, I do not share. That the Council, as European legislator, is also bound by the general principles of Community law follows from the *rule of law*, as is also shown in Article 6 EU Treaty. That directives, in some cases, 'merely' intend to facilitate the enforcement of obligations, instead of creating new obligations, is not unique. Nor is it shocking that the Court holds the opinion that general principles of Community law can have direct effect and may also be relied on as a 'sword' and as a 'shield' in relationships of a purely civil law nature. The fact that there exists a general principle of equal treatment in Community law is not new either. Furthermore, the entry into force of the Treaty of Amsterdam has confirmed that 'age' is a suspect distinguishing criterion in European law. Taken all together, and against the background of the equal treatment obligations under general international law and national constitutional law, indeed this does seem sufficient, as was also the view of the Court of Justice, to reach the conclusion that a general principle of Community law prohibiting age discrimination exists, containing a core prohibition that can be relied on even in private law relationships, in order to challenge national legislation that conflicts with that principle. That, however, does not explain why the German legislation violates that principle. The fact that the German legislation is considered to infringe Article 6(1) of Directive 2000/78 is insufficient reasoning for *that* conclusion.

36. Since, for the time being, I assume that the approach taken in *Mangold*, in principle, also can be applied to all other general principles of Community law.